

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ELI TONEY DERAY,	)	Case No.
	)	CV-10-1845 VBF (RNB)
Petitioner,	)	
	)	
v.	)	
	)	
WARDEN,	)	
	)	
Respondent,	)	
	)	

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**MOTION TO DISMISS PETITION FOR WRIT  
OF HABEAS CORPUS**

STEVE COOLEY  
District Attorney of  
Los Angeles County

TRACEY W. LOPEZ  
State Bar No. 174102

PATRICK D. MORAN  
State Bar No. 066907

Deputy District Attorneys

Appellate Division  
320 West Temple Street, Suite 540  
Los Angeles, California 90012  
Telephone: (213) 974-5911

Attorneys for Respondent

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STEVE COOLEY  
District Attorney of Los Angeles County  
PATRICK D. MORAN, State Bar No. 066907  
TRACEY W. LOPEZ, State Bar No. 174102  
320 West Temple St., Suite 540  
Los Angeles, California 90012-3213  
Telephone: (213) 974-5911  
Fax: (213) 217-5104  
Email: tlopez@da.lacounty.gov

Attorneys for Respondent

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ELI TONEY DELRAY,

Petitioner,

v.

WARDEN,

Respondent.

Case Number:  
CV-10-1845 VBF (RNB)

MOTION TO DISMISS  
HABEAS CORPUS PETITION;  
MEMORANDUM OF POINTS  
AND AUTHORITIES;  
EXHIBITS

United States Magistrate Judge  
Honorable Robert N. Block

TO THE HONORABLE COURT AND TO PETITIONER:

The District Attorney for the County of Los Angeles hereby makes this motion to dismiss the Petition for Writ of Habeas Corpus (hereafter "Petition") brought by Petitioner Eli Toney DelRay (hereafter "DelRay" or "Petitioner"), for failure to state a proper respondent, failure to exhaust available state remedies, lack of ripeness and based on the abstention doctrine under *Younger v. Harris*, 401 U.S. 37 (1971).

This Motion is based on the Petition and its Exhibits, the attached Memorandum of Points and Authorities, the attached Appendix and any arguments

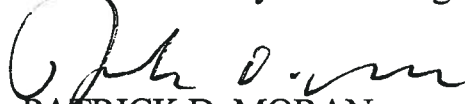



1 which may be adduced at a hearing on the Motion, should one be scheduled.  
2

3 WHEREFORE, Respondent prays that the Petition be dismissed.  
4

5 Dated: June 28, 2010

6 Respectfully submitted,  
7 STEVE COOLEY,  
8 District Attorney of Los Angeles County

9   
10 PATRICK D. MORAN

11   
12 TRACEY W. LOPEZ  
13 Deputy District Attorneys  
14 Appellate Division  
15 Attorneys for Respondent  
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2 **MEMORANDUM OF POINTS AND AUTHORITIES IN**  
3 **SUPPORT OF MOTION TO DISMISS**

4 **INTRODUCTION**

5  
6 Petitioner Eli Toney DelRay (hereafter “Petitioner” or “DelRay”) is  
7 currently detained pending a trial to determine whether, beyond a reasonable doubt,  
8 he qualifies for involuntary civil commitment as a sexually violent predator (hereafter  
9 “SVP”) within the meaning of California Welfare and Institutions Code (hereafter  
10 “W&I Code”) sections 6600 et seq., which is also known as the Sexually Violent  
11 Predator Act. If the allegations of the SVP petition are found true at trial, DelRay  
12 would be committed to a state hospital for treatment. Pending a jury trial, pursuant to  
13 his own request, DelRay is currently being housed at the Coalinga State Hospital  
14 rather than the Los Angeles County Jail. DelRay has never previously been adjudged  
15 to be an SVP; instead, the underlying civil commitment case has been continuously  
16 pending since it was filed in 1996. Trial upon this case has been delayed either upon  
17 the stipulation of the parties or upon request of Petitioner, who has at all times been  
18 represented by counsel in the superior court.

19  
20 DelRay seeks release and dismissal of the SVP petition. Respondent  
21 urges this Court to abstain from addressing the Petition pursuant to *Younger v. Harris*,  
22 401 U.S. 37 (hereafter “*Younger*”), and to dismiss the Petition for failure to state a  
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proper respondent, lack of ripeness and failure to exhaust available state remedies.<sup>1</sup>

### **STATEMENT OF THE CASE**

On or about April 8, 1975, Petitioner was convicted in the State of Ohio in Case No. CR-15641 of felony crimes of Gross Sexual Imposition and Rape [hereafter “the Ohio convictions”] for which he received a prison sentence. Petition, Ex. 1-3.<sup>2</sup>

On January 29, 1987, Petitioner was convicted in the County of Los Angeles in Case No. A766947, of three felony counts of Lewd Acts With a Child, in violation of California Penal Code section 288, subdivision (a). Petition, Ex. 4. During that proceeding, a prior conviction allegation was found not true by the court. *Ibid.*, see also Petition, Attach. A [explaining that the “not true” finding was based upon a variance between the prior conviction allegations in the criminal information and the conforming proof regarding the elements of the Ohio convictions].

On November 19, 1993, Petitioner was convicted in the County of Los Angeles in Case No. BA080477, of one felony count of Indecent Exposure, in violation of California Penal Code section 314, subdivision (1), and was sentenced to a determinate term of three years in state prison. Petition, Ex. 6. As Petitioner’s anticipated parole date approached, a screening process commenced to determine

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<sup>1</sup> Pursuant to this Court’s scheduling order, defenses which relate to the merits of Petitioner’s claims, such as failure to state a federal claim and procedural defaults, would be raised in an answer, to be filed only if this Motion is denied.

<sup>2</sup> Citations to “Exhibits” or “Attachments” [which include both numbers and letters of the alphabet] refer to exhibits to the Petition; for clarity, the District Attorney

1 whether he should be referred for civil commitment as an SVP.

2 On January 29, 1996, a Department of Corrections Correctional  
3 Counselor completed an SVP screening form, and a Classification and Parole  
4 Representative co-signed the form on February 8, 1996. Petition, Ex. 8.

6 On April 15, 1996, Petitioner's case was referred by the Board of Prison  
7 Terms and the Department of Corrections to the Department of Mental Health for  
8 further SVP evaluation. Petition, Ex. 9. On April 23, 1996, an additional review  
9 took place. Petition, Ex. 10.

11 On May 6, 1996, Petitioner consented in writing to be interviewed by  
12 two psychiatrists for evaluation as a potential SVP. Petition, Ex. 11. On May 17,  
13 1996 and May 20, 1996, the psychiatrists each opined in one-page Clinical  
14 Evaluation Summary forms that DelRay fit the SVP criteria, in that he had committed  
15 sexually violent predatory offenses against two or more victims, had a diagnosable  
16 mental disorder and was likely to engage in sexually violent criminal behavior as a  
17 result. Petition, Ex. 12.

20 On May 21, 1996, [which was the date Petitioner would otherwise have  
21 been eligible for release upon parole] the Board of Prison Terms instead conducted an  
22 administrative hearing to determine whether there existed "probable cause"<sup>3</sup> that  
23

24  
25 (..continued)

26 refers to attachments to this Motion to Dismiss as "Appendices."

27 <sup>3</sup> An SVP is also entitled to an entirely separate judicial "probable cause"  
28 proceeding conducted in superior court *after* an SVP petition is filed and counsel is  
appointed, during which witness testimony is presented under oath subject to  
cross-examination. *Cooley v. Superior Court (Marentez)* 29 Cal.4th 228 (2002)

1 DelRay was an SVP in order to justify a 45-day hold on his scheduled parole release  
2 date. Petition, Ex. 13. The additional forty-five days enabled the psychiatrists'  
3 reports to be submitted to the Director of the Department of Mental Health, for him to  
4 evaluate the case, and to forward it on to the Los Angeles County District Attorney to  
5 determine whether an SVP civil commitment petition should be filed. During the  
6 Board of Prison Terms hearing, DelRay was represented by legal counsel, who  
7 argued that (1) DelRay was coerced into being interviewed by the psychiatrists; (2)  
8 the psychiatrists' one page summaries were insufficient basis to hold DelRay; (3)  
9 DelRay did not meet the criteria because the Ohio convictions were for an  
10 indeterminate prison term. *Ibid.* These objections were all overruled. *Ibid.* As a  
11 result, the Deputy Commissioner authorized a 45-day hold effective 12:01 a.m. on  
12 May 22, 1996, to expire on July 5, 1996. *Ibid.*

13  
14 On May 29, 1996, the Director of the Department of Mental Health  
15 referred DelRay's case to the Los Angeles County District Attorney to determine  
16 whether an SVP civil commitment petition should be filed. Petition, Ex. 16.

17  
18 On June 14, 1996, Los Angeles County Deputy District Attorney  
19 Richard Vagnozzi (hereafter "DDA Vagnozzi") requested a removal order to secure  
20 DelRay's presence in Los Angeles County Superior Court from Atascadero State  
21 Hospital where Petitioner was housed at that time. Petition, Ex. 18. Since the  
22 construction of Coalinga State Hospital, all SVPs are currently housed at Coalinga

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26  
27 (..continued)

28 [describing the scope of the judicial probable cause hearing and comparing it to a

1 Hospital rather than Atascadero Hospital; pretrial SVP detainees may also be housed  
2 at the Coalinga Hospital upon their request.

3 On June 18, 1996, on behalf of the Los Angeles County District  
4 Attorney, DDA Vagnozzi filed an SVP petition for civil commitment, which was  
5 assigned Los Angeles Superior Court SVP Case No. ZM001979. Petition, Ex. 19.

6 On June 27, 1996, Petitioner was arraigned upon the SVP petition. Petition, Ex.  
7 21-22. Petitioner requested to be housed at the hospital pending the SVP trial, which  
8 was granted. Petition, Ex. 21. DDA Vagnozzi appeared at the arraignment, but the  
9 transcript reflects that he did not address the court. Petition, Ex. 22. At all times  
10 during the SVP trial court proceedings, Petitioner was represented by the Los  
11 Angeles County Public Defender's Office. During the arraignment, DelRay's  
12 attorney referred to the "first fifteen"<sup>4</sup> SVP cases which had been filed by Los  
13 Angeles County, and Petitioner's desire to achieve a "similar result" of a dismissal in  
14 his case. Petition, Ex. 22.

15 At his arraignment, Petitioner waived time to await the result of the  
16  
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20  
21 (..continued)  
22 preliminary hearing in a felony criminal case].

23 <sup>4</sup> DelRay's case was commenced shortly after the first fifteen SVP litigants secured  
24 dismissals, which were reversed in *Garcetti v. Superior Court (Rasmussen)*,  
25 previously published at 49 Cal.App.4th 1533 (Oct. 10, 1996), review granted by the  
26 California Supreme Court and review dismissed Feb. 16, 2000. California  
27 unpublished and previously published cases may not be cited for their legal  
28 authority. Cal.Rules of Court, Rule 8.1115. However, this citation is provided only  
to clarify the discussion at arraignment and the fact that that DelRay was *not* a  
litigant in *Garcetti v. Superior Court (Rasmussen)*, which was *not* a class action  
proceeding, and which did *not* prevent the trial court from trying this SVP case at  
any time. Petition, Attach. G.

1 constitutional challenge to the SVP law made by the petitioners in *Garcetti v.*  
2 *Superior Court (Rasmussen)*. Petition, Ex. 22 [requesting a new court date of  
3 September 3, 1996]. The District Attorney affirmatively alleges that at all times  
4 during the pendency of this SVP proceeding, continuances were granted either upon  
5 the stipulation of the parties or upon Petitioner's request, and also that he has  
6 intentionally sought to delay his SVP trial in order to pursue habeas corpus relief. See,  
7 e.g., Petition, p. 3, paragraph 9, subd. D ["Petitioner received a continuance to pursue  
8 his Writ in the Court of Appeals . . . ."].  
9

11           On June 18, 1999, Petitioner filed a motion to dismiss the SVP  
12 proceeding. Appendix 1. In the motion, Petitioner argued that his Ohio convictions  
13 did not qualify under the SVP statutes as originally drafted, because they were from  
14 out of state, and because they resulted in an indeterminate sentence rather than a  
15 determinate sentence. *Ibid.* The motion also argued that the Ohio convictions had  
16 been previously found "not true" in California, so that principles of res judicata and  
17 collateral estoppel barred use of the Ohio convictions in this SVP proceeding. *Ibid.*  
18

20           On June 28, 1999, the District Attorney filed a written opposition to  
21 DelRay's motion to dismiss the SVP proceeding. Appendix 2. The opposition  
22 argued that under *People v. Butler* (1998) 68 Cal.App.4th 421, 440, the 1996  
23 amendments to the SVP statute applied retroactively to this case and that the Ohio  
24 convictions could be used as predicate offenses in this SVP proceeding. *Ibid.*  
25

26           On August 9, 1999, Deputy District Attorney Rebecca Marie Madrid  
27  
28



1 filed an amended petition for civil commitment as an SVP, which superseded the  
2 original petition filed by DDA Vagnozzi. Petition, Ex. 36.

3 On November 19, 1999, Petitioner filed a Supplemental Motion to  
4 Dismiss Due to Lack of Qualifying Sexually Violent Offense. Appendix 3. In the  
5 Supplemental Motion, Petitioner argued that the Ohio convictions could not be used  
6 as predicate offenses because the 1996 amendments to the SVP statutes could not be  
7 applied retroactively, and also because the legal elements of the Ohio crimes did not  
8 correspond to the list of qualifying sexually violent crimes. *Ibid.*

11 On December 16, 1999, the supplemental motion was heard and denied  
12 by the superior court. Appendix 4. During the hearing, DelRay's counsel  
13 acknowledged that a new published decision had been issued by the California Court  
14 of Appeal about two weeks before the hearing. *Id.* at pp. 2-3 [referring to *Garcetti v.*  
15 *Superior Court (Pierre)* (1999) 76 Cal.App.4th 685, 693-694 (holding that the 1996  
16 amendment to the SVP statute permitting predicate offenses with either determinate  
17 or indeterminate sentences could be applied to an SVP petition which was filed  
18 *before* the amendment was enacted, because neither the judicial probable cause  
19 hearing nor SVP trial had yet been conducted)]. The superior court denied the  
20 motion based on the *Pierre* decision. Appendix 4; Appendix 11.

24 On January 18, 2000, the superior court denied a motion to reconsider  
25 the motion to dismiss the SVP proceeding. Appendix 12.

27 On February 22, 2000 and March 1, 2000, the judicial probable cause  
28



1 hearing was commenced in superior court and evidence was presented from mental  
2 health experts. Appendix 13.

3           On April 28, 2000, Petitioner filed a third motion to dismiss the SVP  
4 proceeding, on grounds that he was eligible for parole at the time the SVP petition  
5 was filed. Appendix 5. In particular, the motion argued that the Board of Prison  
6 Terms failed to follow proper procedures in authorizing the forty-five day hold, so  
7 that he was unlawfully detained. *Ibid.* [acknowledging adverse authority in *Garcetti*  
8 *v. Superior Court (Lyles)* (1998) 68 Cal.App.4th 1105 and *People v. Superior Court*  
9 *(Whitley)* (1999) 68 Cal.App.4th 1383].

10           On May 10, 2000, the District Attorney filed a written opposition to the  
11 motion to dismiss. Appendix 6 [arguing that the Board of Prison Terms was  
12 authorized to place the 45-day hold upon DelRay, and that the District Attorney  
13 properly filed the SVP petition].

14           On May 23, 2000, the superior court denied the motion to dismiss based  
15 upon the decision in *Garcetti v. Superior Court (Lyles)* (1998) 68 Cal.App.4th 1105.

16 Appendix 14.

17           On May 25, 2000, the superior court again stated that the motion to  
18 dismiss was denied, and determined that there was probable cause to believe that  
19 DelRay was an SVP. Appendix 15. Petitioner is currently being detained pending  
20 his SVP trial by the County of Los Angeles pursuant to this probable cause order.

21           On January 16, 2006, DelRay was transferred from Atascadero State  
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1 Hospital to Coalinga State Hospital. Appendix 16.

2 On July 27, 2006, DelRay filed a written time waiver for his trial from  
3 July 18, 2006 through July 18, 2007. Appendix 17.

4 On October 11, 2006, the District Attorney, the Public Defender and the  
5 Superior Court entered into a joint stipulation that if determined to be an SVP,  
6 DelRay would face a two-year<sup>5</sup> commitment rather than the indeterminate  
7 commitment provided for by Proposition 83, commonly known as Jessica's Law  
8 (Nov. 7, 1996 ballot). *People v. Castillo*, 49 Cal.4th 145 (2010).

9 On April 16, 2008, the SVP proceeding was transferred to Department  
10 100 [the master calendar court] and subsequently to Department 116 for all purposes,  
11 including jury trial. Appendix 18.

12 On May 6, 2008, Petitioner filed a motion to dismiss this proceeding,  
13 captioned as an *in limine* motion pursuant to California Evidence Code § 402.  
14 Appendix 7. In the motion, Petitioner argued that this proceeding should be  
15 dismissed because (1) the 1996 amendments to the SVP statutes [which explicitly  
16 permitted use of out of state priors with indeterminate sentences] should not apply to  
17 this case; (2) the elements of the Ohio statutes do not correspond to California law;  
18 and (3) under principles of res judicata and collateral estoppel, the Ohio convictions  
19 were previously found to be "not true." *Ibid*.

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27 <sup>5</sup> The SVP commitment of two years runs from the date of the commitment order.  
28 *People v. Hubbart*, 88 Cal.App.4th 1202, 1222-23 (2001). DelRay is not  
entitled to credit for pretrial detention because this is not a criminal case.

1 On May 6, 2008, Petitioner filed a motion to dismiss this proceeding on  
2 grounds that he was eligible for parole at the time the petition was filed, arguing that  
3 DelRay's custody was unlawful. Appendix 8.

4  
5 On May 6, 2008, the District Attorney filed written oppositions to each  
6 of these motions to dismiss, upon each of the grounds. Appendix 9, Appendix 10.

7  
8 On May 6, May 29 and June 17, 2008, counsel and the court discussed  
9 issues relating to the SVP trial. Appendix 19.

10 On June 10, 2008, Petitioner filed a petition for writ of habeas corpus in  
11 the Los Angeles Superior Court which was denied on June 19, 2008 by the honorable  
12 Norm Shapiro, judge presiding. Appendix 20.

13  
14 On August 4, 2008, Petitioner desired to further pursue his habeas  
15 corpus remedy; thereupon the matter was transferred from Department 116 [trial  
16 department] back to Department 95 [pretrial department]. Appendix 21.<sup>6</sup>

17  
18 On November 7, 2008, Petitioner filed a petition for writ of habeas  
19 corpus in the California Court of Appeal, which was denied on December 19, 2008.  
20 Appendix 22.

21  
22 On April 28, 2009, Petitioner filed a petition for writ of habeas corpus in  
23 the California Supreme Court, which was denied on September 30, 2009. Appendix  
24 23.

25  
26  
27 <sup>6</sup> The minute order reflects that DelRay was advised that he might face an  
28 indeterminate commitment; however, this was before the stipulation for a two-year  
commitment was upheld in *People v. Castillo*, 49 Cal.4th 145 (2010).

1           On March 15, 2010, the instant Petition for Writ of Habeas Corpus was  
2 filed in this Court.

3                           **SUMMARY OF FEDERAL HABEAS CORPUS CLAIMS**

4           In Claim One, Petitioner alleges that he was denied his constitutional  
5 rights under the First, Fifth, Sixth and Fourteenth Amendments by the Department of  
6 Corrections and the Department of Mental Health during his SVP screening.  
7

8           In Claim Two, Petitioner alleges that he was denied his constitutional  
9 rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments  
10 because the Board of Prison Terms unlawfully seized and detained him past his  
11 parole date.  
12

13           In Claim Three, Petitioner alleges that he was denied his constitutional  
14 rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments  
15 because the Department of Mental Health unlawfully seized and detained him past his  
16 parole date without a valid court order.  
17

18           In Claim Four, Petitioner alleges that he was denied his constitutional  
19 rights under the First, Fourth, Eighth and Fourteenth Amendments because DDA  
20 Vagnozzi “intentionally misled the court” and caused him to be illegally restrained by  
21 filing the SVP petition and requesting a removal order to secure his presence in court.  
22

23           In Claim Five, Petitioner alleges that he was denied his constitutional  
24 rights under the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments  
25 because the superior court lacked jurisdiction to arraign Petitioner upon the SVP  
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petition or to hold a probable cause hearing.

## ARGUMENT

### I

## **THIS COURT CAN SUMMARILY DISMISS THE HABEAS CORPUS PETITION**

Because the habeas corpus petition in this case was filed on March 15, 2010, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter “AEDPA”), which was signed into law on April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997). Summary dismissal is proper when “it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” 28 U.S.C.A. foll. Section 2254, Rule 4.

The Advisory Committee Note to Rule 4 discusses grounds upon which a motion to dismiss can be granted: “For example, the judge may want to authorize ... a motion to dismiss based upon information ... that petitioner has failed to exhaust state remedies; that the petitioner is not in custody within the meaning of 28 U.S.C. Section 2254; or that a decision in the matter is pending in a state court.” *White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989), quoting the Advisory Committee Note, *superseded by statute* on another ground. Thus, this Court can summarily dismiss a habeas corpus petition. *O'Brenski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990) (reviewing a motion to dismiss for non-exhaustion); *Rouse v. Lee*, 339 F.3d 238, 241 (4th Cir. 2003) (upholding a district court's dismissal of a habeas corpus

1 petition filed one day after the AEDPA statute of limitations had expired).

2 As set forth more fully herein, dismissal is appropriate in this case  
3 because a decision regarding DelRay's commitment (custody status) is currently  
4 pending in a state court and has not yet been finally adjudicated.  
5

## 6 II

### 7 8 THE DISTRICT COURT LACKS PERSONAL 9 JURISDICTION BECAUSE PETITIONER FAILED 10 TO ALLEGE A NAMED RESPONDENT 11

12 In order to obtain habeas relief, Petitioner must demonstrate that he is  
13 "in custody" as a jurisdictional requirement. *Maleng v. Cook*, 490 U.S. 488, 490  
14 (1982) (per curiam); *Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998).  
15 In other words, the essence of habeas corpus is an attack by a person in custody  
16 against the legality of that custody. *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973).  
17 The question of "custody" implicates two issues: the identity of the respondent  
18 custodian, and whether there exist circumstances sufficient to create custody.  
19  
20

21 "A petitioner for habeas corpus relief must name the state officer having  
22 custody of him or her as the respondent to the petition." *Stanley v. California*  
23 *Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994) (dismissing a case for lack of  
24 personal jurisdiction based upon the failure to name a custodian as a respondent).  
25 The proper respondent to a habeas corpus petition is generally the person who has  
26 custody over the petitioner. *Rumsfield v. Padilla*, 542 U.S. 426, 434 (2004).  
27  
28

1 Here, the Petition is subject to dismissal for lack of personal jurisdiction  
2 because it specifies only an unnamed "Warden" as Respondent. *Stanley v.*  
3 *California Supreme Court*, 21 F.3d at 360. DelRay is currently remanded to the legal  
4 custody of Leroy D. Baca, the elected Sheriff of Los Angeles County, pursuant to an  
5 order of the Los Angeles Superior Court in a pending SVP case, No. ZM00197.  
6 Appendix 15 [probable cause order]. In Los Angeles County, the Sheriff has legal  
7 authority over the county jail and acts as the legal custodian of all prisoners and  
8 detainees such as DelRay. Cal. Penal Code § 4000; Cal. Gov. Code § 26605.  
9 Pending his SVP trial, Del Ray requested to be physically housed at Coalinga State  
10 Hospital where he can receive treatment during times when he is not in court. Petition,  
11 Ex. 21. The Superior Court granted DelRay's request, and accordingly, Sheriff Baca  
12 delegated DelRay's daily care to the Coalinga State Hospital. However, DelRay  
13 remains detained by the County of Los Angeles, and his legal custodian is the Sheriff,  
14 *not* entities such as the Department of Mental Health, Department of Corrections or  
15 the Board of Prison Terms which had custody of DelRay before his parole expired.<sup>7</sup>  
16 *Allen v. Oregon*, 153 F.3d 1046 (9th Cir. 1998)(explaining that a petitioner was not in  
17 state custody because his sentence had expired, and therefore the federal custodian  
18 was an indispensable party); *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir.  
19 1992) (explaining that a federal habeas petitioner's custodian is the person that can  
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27 <sup>7</sup> DelRay's parole expired by operation of law before he first sought habeas corpus  
28 relief from the superior court in 2008. (Petition, Ex. 34 [parole expired three years  
from June 29, 1998].)



1 actually produce the body of the petitioner).

2 Although the Los Angeles County Sheriff has sufficient custody of  
3 DelRay to be a respondent and the District Attorney is filing this motion to dismiss  
4 the Petition, the District Attorney is not counsel for the Los Angeles County Sheriff  
5 and does not address any claims regarding conditions of confinement or DelRay's  
6 treatment while detained.<sup>8</sup> The District Attorney's failure to address any such claims  
7 does not waive any issue properly addressed by another respondent. The District  
8 Attorney appears on behalf of the government to address claims that the Los Angeles  
9 County Superior Court's jurisdiction over the SVP petition was defective and that  
10 there has been any violation of his constitutional rights which would entitle him to  
11 release from Los Angeles County custody at this time.  
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### 15 III

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17 **ABSTENTION IS APPROPRIATE BECAUSE**  
18 **THERE IS A PENDING STATE COURT**  
19 **PROCEEDING**  
20

21 In *Younger, supra*, 401 U.S. 37, the United States Supreme Court set  
22 forth certain principles of federalism pursuant to which federal courts should abstain  
23

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24 <sup>8</sup> Claims regarding events which transpired *before* DelRay was detained upon the  
25 SVP petition would be moot because Petitioner is no longer in the custody of the  
26 Department of Corrections, the Board of Prison Terms and the Department of Mental  
27 Health and this Court cannot grant a habeas remedy of release from entities that do  
28 not have custody of DelRay. These past events are legally relevant— if at all —only to  
the degree that they would impact the legality of DelRay's current detention by the  
County of Los Angeles upon the pending SVP petition.



1 from deciding issues which are pending in state court proceedings: It is a “basic  
2 doctrine of equity jurisprudence that courts of equity should not act, and particularly  
3 should not act to restrain a criminal prosecution, when the moving party has an  
4 adequate remedy at law . . . .” *Id.* at 43. The abstention doctrine is based upon the  
5 notion of “comity,” or respect for the freedom of states to perform their own functions  
6 without undue interference. *Id.* at 44. In practice, the *Younger* doctrine means that  
7 “only in the most unusual circumstances is a defendant entitled to have federal  
8 interposition by way of injunction or habeas corpus until after the jury comes in,  
9 judgment has been appealed from and the case concluded in the state courts.”  
10 *Carden v. Montana*, 626 F.2d 82, 83-84 (9th Cir. 1980), cert. denied, 449 U.S. 1014  
11 (1980), citation omitted.

12  
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15 Although the *Younger* abstention principles were enunciated in the  
16 setting of pending state criminal proceedings, those principles have been held to  
17 apply also when there are pending civil proceedings if the State's interests in the  
18 proceedings are sufficiently important that to exercise federal judicial power would  
19 be to disregard comity. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-605 (1975);  
20 *Moore v. Sims*, 442 U.S. 415, 423 (1979). It is beyond dispute that California has an  
21 important interest in detaining and treating individuals who may be dangerous to  
22 others because they suffer from a mental defect or disorder which causes them to  
23 engage in sexually predatory behavior. *United States v. Comstock*, \_\_ U.S. \_\_; [130  
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(..continued)

1 S.Ct. 1949; 2010 WL 1946729] (May 17, 2010) (upholding the constitutionality of a  
2 federal statute which authorized the civil commitment of a sexually violent predator  
3 beyond his otherwise applicable release date under the “necessary and proper”  
4 clause); *Hubbart v. Superior Court*, 19 Cal.4th 1138, 1153 fn. 20 (1999)(SVP  
5 proceedings serve “compelling” state interests in the protection of the public and the  
6 treatment of mental illness).  
7

8  
9 If *Younger* applies, a court may not retain jurisdiction, but should  
10 instead dismiss the action. *Juidice v. Vail*, 430 U.S. 327, 348 (1977). District Courts  
11 have concluded that *Younger* abstention applies to pending federal habeas corpus  
12 petitions brought by detainees whose SVP proceedings have not yet finally been  
13 adjudicated. *Dannenberg v. Nakahara*, 1998 WL 661467 \*1-2 (N.D. Cal. 1998)  
14 (declining to “step into the middle of state commitment proceedings” under the  
15 *Younger* abstention doctrine); *Woodard v. Plummer*, 2002 WL 3833416 \*1 (N.D.  
16 Cal. 2002)(concluding that *Younger* abstention was appropriate because pending  
17 SVP proceedings implicated an important state interest and afforded an adequate  
18 opportunity to raise constitutional claims); *Clemons v. Kramer*, 2008 WL 3833416  
19 \*2-5 (C.D. Cal. 2008) (concluding that *Younger* abstention applied where a petitioner  
20 claimed that the superior court lacked jurisdiction to bring an SVP proceeding against  
21 him after his parole release date, and that the civil commitment would violate *ex post*  
22 *facto* principles); *O’Shell v. Mayberg* 2009 WL 3061982 \*2-4 (S.D. Cal.  
23 2009)(concluding that *Younger* abstention applied when there was a direct appeal of  
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1 an SVP commitment pending in state court); *Mouzon v. McLain*, 2007 WL 4219432  
2 \* 1-2 (dismissing a habeas petition when there was a pending SVP trial); *Jones v.*  
3 *McClain*, 2008 WL 538672 \*3-6 (C.D. Cal. 2008)(same).  
4

5 *Younger* abstention requires that pending state proceedings be judicial  
6 in nature, implicate important state interests, and afford the petitioner an adequate  
7 opportunity to raise constitutional challenges. *Middlesex County Ethics Comm. v.*  
8 *Garden State Bar Assn.*, 457 U.S. 423, 432 (1982). Here, a pending SVP petition in  
9 state court satisfies all of those requirements as well as the important state interest  
10 requirement. Federal questions are regularly litigated in the ordinary course of  
11 judicial proceedings in California's state courts. See, e.g., *Hubbart v. Superior Court*,  
12 *supra*, 19 Cal.4th at pp. 1149-51 (1999) (constitutional issues relating to an SVP  
13 proceeding). In the case *sub judice*, there is no reason to doubt that the pending SVP  
14 proceedings and subsequent appeal rights will afford DelRay all the constitutional  
15 protection he may wish to invoke.  
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19 The United States Supreme Court has stated that federal courts should  
20 not enjoin pending state proceedings absent a showing of the state's bad faith or  
21 harassment, or a showing that the statute challenged is "flagrantly and patently  
22 violative of express constitutional prohibitions." *Younger*, 401 U.S. at 46, 53-54  
23 (explaining that cost, anxiety and the inconvenience of presenting a defense are not  
24 the kind of special circumstances or irreparable harm that would justify federal court  
25 intervention; instead, a statute must be unconstitutional in every "clause, sentence and  
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1 paragraph, and in whatever manner” it is applied). *Ibid.*

2 Respondent hereby moves for dismissal based on the abstention doctrine.  
3 DelRay does not attack a state judgment under which he is or will be subject to  
4 custody, but instead the manner in which the SVP petition was brought and the fact  
5 that the Los Angeles Superior Court has declined to dismiss the SVP proceeding and  
6 concluded instead that the matter should proceed to trial. This Court should abstain  
7 from adjudicating DelRay’s claims concerning those pending state proceedings.  
8  
9

10 DelRay has not shown any harassment by state officials; the mere fact  
11 that Petitioner legally disagrees that the superior court has jurisdiction over the  
12 underlying SVP proceeding does not equate to harassment. A judicial probable cause  
13 hearing was held during which expert witnesses testified, and were subject to  
14 cross-examination by DelRay’s attorney, and a superior court judge found probable  
15 cause to go forward with the SVP commitment proceedings against DelRay.  
16  
17 Appendix 15. Although DelRay claims misconduct by the DDA Vagnozzi by “lying  
18 to the court,” this claim relates solely to the prosecutor’s official duties in filing the  
19 SVP petition and seeking a removal order to secure DelRay’s presence in court, both  
20 of which DelRay views as legally improper. Indeed, DDA Vagnozzi did not even  
21 address the court during the arraignment. *Petition, Ex. 22; Gingrich v. Oberhauser*,  
22 305 F.Supp. 738, 741-742 (C.D. Cal. 1969)(transcripts are presumed to be correct).  
23  
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26 Neither has DelRay demonstrated irreparable injury. The Supreme  
27 Court has explained that irreparable injury does not exist if the threat to the  
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petitioner's federally protected constitutional rights may be eliminated by his defense of the pending case. *Younger, supra*, 401 U.S. at 53-54. The mere fact that DelRay prefers a dismissal rather than a trial does not mean that he would be irreparably harmed by permitting this case to be litigated to a conclusion in the state courts. DelRay has not claimed – and indeed *cannot* claim – that California's SVP statutes are patently unconstitutional as drafted and applied, because the United States Supreme Court has already upheld the constitutionality of SVP statutes upon which California's statutory scheme for SVPs was modeled. *Kansas v. Hendricks*, 521 U.S. 346, 356-358 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002); *Hubbart v. Superior Court, supra*, 19 Cal.4th at 1171-79 (California's SVP proceedings are "substantially similar" to those of Kansas). Abstention is therefore appropriate.

#### IV

### **THIS HABEAS PETITION IS NOT YET RIPE FOR REVIEW AND AVAILABLE STATE REMEDIES HAVE NOT BEEN EXHAUSTED**

A challenge regarding whether a particular detainee can legally be adjudicated as an SVP is not yet ripe for review where such determination has not been made, and indeed may not ever be made if the alleged SVP prevailed either at trial or upon subsequent state court appeal. *Rhoden v. Mayberg*, 2008 WL 52220202 \*2-4 (E.D. Cal. 2008) (concluding that a habeas petition brought by a pretrial SVP detainee was not ripe for review and that *Younger* abstention was appropriate). When

1 an issue is not ripe, there is no “case or controversy” for federal courts to decide: The  
2 United States Supreme Court has stated that the rationale of the ripeness doctrine is  
3 “to prevent the courts, through premature adjudication, from entangling themselves in  
4 abstract disagreements.” *Thomas v. Union Carbide Agricultural Products Co.*, 473  
5 U.S. 568 (1985). It is not the role of the federal courts “to issue advisory opinions nor  
6 to declare rights in hypothetical cases, but to adjudicate live cases and  
7 controversies . . . .” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F. 3d 1134  
8 (9th Cir. 2000). A case is not ripe when it is “anchored in future events that may not  
9 occur as anticipated, or at all.” *Rhoden v. Mayberg*, 2008 WL 52220202 at \*2 (E.D.  
10 Cal. 2008). Here, no case or controversy currently exists, and may not ever exist,  
11 depending upon the result of the SVP trial and subsequent state court appellate  
12 proceedings.  
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17 It logically follows from the fact that the habeas petition is not yet ripe,  
18 that dismissal is also appropriate because DelRay has failed to exhaust state remedies  
19 which remain available before applying for federal habeas relief. *Duncan v. Henry*,  
20 513 U.S. 364, 365-366 (1995) (per curiam). State courts must first be given a “fair  
21 opportunity” to address alleged violations of constitutional rights, applying  
22 controlling legal principles to the facts, before federal habeas relief is available.  
23 *Picard v. Connor*, 404 U.S. 270, 275-277 (1971); cf. *Rose v. Lundy*, 455 U.S. 509,  
24 518-519 (1982), superseded by statute and abrogated on other grounds by *Rhines v.*  
25 *Weber*, 544 U.S. 269 (2005).  
26  
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1 DelRay is pending trial and an order of commitment on his SVP petition.  
2 Jurisdiction to issue a writ of habeas corpus before a judgment is rendered in a state  
3 criminal proceeding lies under 28 U.S.C. § 2241(c)(3), not under § 2254. *Braden v.*  
4 *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Moore v. DeYoung*,  
5 515 F.2d 437, 442, 443 (3d Cir. 1975); *McNeely v. Blanas*, 336 F.3d 822, 824 fn. 1  
6 (9th Cir. 2003). Habeas corpus review under § 2241 is available if the petitioner  
7 satisfies two jurisdictional requirements: (a) that he is “in custody,” and (b) that the  
8 legality of custody is challenged because it is “in violation of the Constitution or laws  
9 or treaties of the United States.” 28 U.S.C. § 2241(c)(3); see also *Maleng v. Cook*,  
10 490 U.S. 488, 490 (1989).

14 Although no exhaustion requirement is mandated by statute for claims  
15 under 28 U.S.C. § 2241(c)(3), federal courts have nonetheless required exhaustion in  
16 such habeas petitions. *Clemons v. Kramer*, 2008 WL 3833416 \*5-6 (C.D. Cal.  
17 2008)(concluding that a pretrial SVP detainee had not yet exhausted available state  
18 appellate remedies although he presented his claims to the California Court of Appeal  
19 and the California Supreme Court in habeas corpus petitions). Thus, principles of  
20 federalism and comity require abstention until all state proceedings are completed  
21 and DelRay exhausts available state remedies, absent special circumstances  
22 warranting federal intervention prior to a state trial. See *Carden v. Montana*, 626  
23 F.2d at 83-84 & n. 1 (9th Cir. 1980); *United States ex rel. Goodman v. Kehl*, 456 F.2d  
24 863, 869 (2d Cir. 1972) (pretrial detainees must exhaust state remedies); see also  
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1 *Moore v. DeYoung*, 515 F.2d at 447 (alleged denial of a speedy trial is not an  
2 extraordinary circumstance warranting pretrial habeas relief).

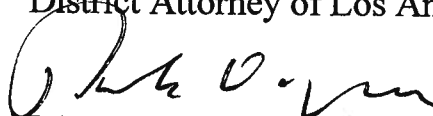
3 Exhaustion applies only to *available* state remedies, i.e., state remedies  
4 still available at the time of the federal petition. *Engle v. Isaac*, 456 U.S. 107, 125,  
5 n.28 (1982). At this time, DelRay still has available to him the SVP trial through  
6 which he can present defenses, including claims that his constitutional rights have  
7 been violated or that the court lacks jurisdiction. Assuming a lack of success at trial,  
8 DelRay still has appellate remedies, which also have not been exhausted. Therefore,  
9 this Court should dismiss the Petition for lack of ripeness and for failure to exhaust  
10 state court remedies.  
11  
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13

### 14 CONCLUSION

15 For all of the reasons stated, the Petition should be dismissed.  
16  
17

18 Dated: June 28, 2010

Respectfully submitted,  
STEVE COOLEY,  
District Attorney of Los Angeles County

20   
21 PATRICK D. MORAN

22  
23 TRACEY W. LOPEZ  
24 Deputy District Attorneys  
25 Appellate Division  
26 Attorneys for Respondent  
27  
28



DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple St., Suite 540, Los Angeles, California 90012. On the date of execution hereof, I served the attached Motion to Dismiss Habeas Corpus Petition; Memorandum of Points and Authorities; Exhibits, upon each addressee by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows, and where indicated, by e-mail:

Eli Toney DelRay  
CSH-000155-2  
Coalinga State Hospital  
24511 West Janey Avenue  
PO Box 5003  
Coalinga, CA 93211-5003

Executed on June 28, 2010, at Los Angeles, California.

  
(Signature) Martha Paez